Nescajaya Sdn Bhd v Suairah bt Parigula & Ors

HIGH COURT (SANDAKAN) — SUIT NO CSS22–56 OF 2009
LEE HENG CHEONG JC
11 MAY 2011

Civil Procedure — Striking out — Action — Land — Native titles — Status of land when entering agreement — Validity of agreement — Power of attorney — Defendants denied executing power of attorney — Whether valid and binding agreement existed between plaintiff and defendants — Whether triable issue — Whether action disclosed reasonable cause of action — Whether should be struck out — Rules of the High Court 1980 O 18 r 19

The plaintiff sued the defendants for a declaration that there was a binding agreement between the plaintiff and the defendants based on the sale and purchase agreement ('the said agreement') signed by the plaintiff and the defendants' lawful attorney. The plaintiff contended that one Abdillah bin Amir had, on 2 February 1988, entered into the said agreement with the plaintiff to, inter alia, sell, their respective lots ('the said lands') to the plaintiff. At the time of signing the said agreement, the plaintiff and the defendants were not sure if the defendants would be issued with native titles and as a result, it was agreed that the defendants would execute a memorandum of sublease for a term of 99 years. The plaintiff further stated that the second to the sixth defendants had on 26 February 1986, each executed their respective powers of attorney to appoint Abdillah bin Amil as their lawful attorney to sell and enter any agreement relating to their said lands. The defendants however contended that the said agreement was null and void and could not be enforced as the said lands were still state land when the agreement was entered. Further, the second to the sixth defendants contended that they did not authorised Abdillah bin Amil to sublease the said lands. Accordingly, the second to the sixth defendants filed an application to strike out the plaintiff's action on the grounds that the facts disclosed no reasonable cause of action or was scandalous, frivolous and vexatious or an abuse of the court process.

Held, dismissing the application with costs:

(1) The power to strike out an action on disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious cases. So long as the statement of claim disclosed some cause of action or raised some questions fit to be decided by a judge, the mere fact that the case was weak and not likely to succeed was no ground for striking it out (see para 17).

(2) Whether the said agreement was a nullity, was a triable issue that ought to be determined during the trial of the case. Witnesses have to be called to give evidence on the validity of the said agreement. Based on the foregoing, this court was satisfied that the claim here was not plainly and obviously unsustainable (see paras 18–19).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan-defendan untuk deklarasi bahawa terdapat perjanjian mengikat di antara plaintif dan defendan-defendan berdasarkan perjanjian jual beli ('perjanjian tersebut') yang ditandatangani oleh plaintif dan wakil sah defendan-defendan. Plaintif berhujah bahawa Abdillah bin Amir telah, pada 2 Februari 1988, memeterai perjanjian tersebut dengan plaintif untuk, antara lain, menjual, lot masing-masing ('tanah-tanah tersebut') kepada plaintif. Semasa menandatangani perjanjian tersebut, plaintif dan defendan-defendan tidak pasti sama ada defendan-defendan akan dikeluarkan dengan hak milik anak negeri dan kesannya, adalah dipersetujui bahawa defendan-defendan akan menandatangani memorandum pajak kecil untuk tempoh 99 tahun. Plaintif selanjutnya menyatakan bahawa defendan kedua hingga keenam pada 26 Februari 1986, telah menandatangani surat kuasa wakil masing-masing untuk melantik Abdillah bin Amil sebagai wakil sah mereka untuk menjual dan memeterai sebarang perjanjian berkenaan dengan tanah-tanah mereka tersebut. Defendan-defendan walau bagaimanapun berhujah bahawa perjanjian tersebut adalah batal dan tidak sah dan tidak boleh dikuatkuasakan memandangkan tanah-tanah tersebut masih lagi tanah negeri apabila perjanjian tersebut termeterai. Selanjutnya, defendan kedua hingga keenam berhujah bahawa mereka tidak memberi kuasa kepada Abdillah bin Amil untuk memajak kecil tanah-tanah tersebut. Dengan itu, defendan kedua hingga keenam telah memfailkan permohonan untuk membatalkan tindakan plaintif atas alasan bahawa fakta-fakta tidak menunjukkan kausa tindakan yang munasabah atau adalah bersifat skandal, remeh dan menyusahkan atau salah guna proses mahkamah.

Diputuskan, menolak permohonan dengan kos:

(1) Kuasa untuk membatalkan suatu tindakan yang tidak menunjukkan kausa tindakan yang munasabah adalah kuasa terus yang mana hanya boleh dilaksanakan di dalam kes-kes yang nyata dan jelas. Selagi penyataan tuntutan menunjukkan sedikit kausa tindakan atau membangkitkan sebarang persoalan yang bersesuaian untuk diputuskan oleh seorang hakim, fakta semata-mata bahawa kes adalah lemah atau tidak berkemungkinan untuk berjaya bukanlah alasan untuk membatalkannya (lihat perenggan 17).

(2) Sama ada perjanjian tersebut adalah batal, adalah isu yang perlu dibicarakan yang seharusnya ditentukan semasa perbicaraan kes. Saksi-saksi hendaklah dipanggil untuk memberi keterangan terhadap

kesahan perjanjian tersebut. Berdasarkan yang tersebut di atas, mahkamah ini berpuas hati bahawa tuntutan ini bukanlah sesuatu yang jelas dan nyata tidak boleh dikekalkan (lihat perenggan 18–19).]

Notes

For cases on striking out action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7428–7473.

Cases referred to

Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440, HC (refd)
Teletech Corporation Sdn Bhd v Siemens Engineering and Services (Pte) Ltd [1993] 2 CLJ 493, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19
Sabah Land Ordinance ss 17, 64

(Tan Pang Tsen & Co) for the plaintiff.
(Martin Idang Rantau & Co) for the defendants.

Lee Heng Cheong JC:

NATURE OF APPLICATION

[1] The plaintiff sued all the defendants for a declaration that there is a binding agreement between the plaintiff and the defendants based on the sale and purchase agreement dated 2 February 1988 signed by the plaintiff and the defendants' lawful attorney.

[2] The second, third, fourth, fifth and sixth defendants filed an application (encl 36) under O 18 r 19 of the Rules of the High Court 1980 for an order that the plaintiff's action be set aside and struck out on the grounds that the facts relied on by the plaintiff disclose no reasonable cause of action or is scandalous, frivolous and vexatious or an abuse of the process of the court.

[3] I have read and considered the followings:

(a) summons in chambers dated 1 July 2010 (encl 36);

(b) the second to sixth defendants' affidavit in support affirmed by Jaafar bin Jakaria on 1 July 2010 (encl 35);

(c) the plaintiff's affidavit in opposition affirmed by Liew Vui Yin on 30 August 2010 (encl 39);

(d) submissions for the second to sixth defendants dated 2 September 2010 (encl 42);

(e) the second to sixth defendants' reply to the plaintiff's affidavit in opposition affirmed by Jaafar bin Jakaria on 7 October 2010 (encl 48);

(f) the plaintiff's written submission dated 21 October 2010 (encl 48);

(g) the plaintiff's written submission dated 21 October 2010 (encl 48);

(h) the plaintiff's bundle of authorities dated 21 October 2010 (encl 49); and

(i) the second to sixth defendants' reply to the plaintiff's submission dated 27 October 2010 (encl 52).

FINDINGS OF THE COURT

Whether the second to sixth defendants had appointed Abdillah bin Amil as their lawful attorney

[4] The third defendant had affirmed an affidavit in support for himself and on behalves of the second, fourth and sixth defendants that they have never authorised or appointed Abdillah bin Amin as their lawful attorney to sell, sublease and enter any agreements relating to their respective lots ('the said lands').

[5] The plaintiff however submitted that the second to sixth defendants had on 26 February 1986, each executed their respective power of attorney to appoint Abdillah bin Amil as their lawful attorney to sell and enter any agreement relating to their said lands.

[6] In this case, the plaintiff had exhibited all the powers of attorney executed by the second to sixth defendants on 26 February 1986 as 'LVY1' in the plaintiff's affidavit in opposition affirmed on 30 August 2010.

[7] Having perused all the powers of attorney, it is found that the said power of attorney had been signed by the second to sixth defendants before a first class magistrate appointing Abdillah bin Amil as their lawful attorney to, inter alia, sell and enter any agreements with any buyers to their said lands. Therefore, this is a reasonable cause of action that ought to be determined during the trial of this case.

Whether the sale and purchase agreement dated 2 February 1998 is a nullity

[8] The plaintiff pleaded that Abdillah bin Amir had on 2 February 1988 entered into a sale and purchase agreement ('the said agreement') with the plaintiff to, inter alia, sell the said lands to the plaintiff together with 27 other land applicants. At the time of signing the said agreement, the plaintiff and the

defendants were not sure if the defendants would be issued with native titles and as a result, it was agreed that the defendants would execute a memorandum of sublease for a term of 99 years at the rental of RM772 per year per lot or title if native titles were issued for their lots.

[9] The plaintiff also pleaded that the land applicants to the 33 lots have been issued with native title and as a result, the plaintiff was not able to purchase the lands as the plaintiff was a non-native.

[10] Learned counsel for the plaintiff submitted that the second to sixth defendants are contractually bound to execute a memorandum of sublease for a term of 99 years. However, as the tenure to sublease native lands is reduced to 30 years only, the plaintiff submit that the defendants are contractually bound to sublease their lots to the plaintiff for three term of 30 years each.

[11] The plaintiff further argued that having obtained their respective titles; the second to sixth defendants have refused to honour their agreements and have refused to sublease their lots to the plaintiff.

[12] The defendants further that the said agreement is null and void and cannot be enforced as the said lands were still state land when the agreement was entered. The said agreement is also caught by ss 17 and 64 of the Land Ordinance (Sabah Cap 68).

[13] The said agreement has been exhibited as 'LVY2' in the plaintiff's affidavit in opposition. The said agreement was signed by Abdillah bin Amil and the plaintiff's director. Encik Abdillah bin Amil had also signed the substitution under the power of attorney dated 2 February 1998 exh as 'LVY' in the plaintiff's affidavit in opposition.

[14] Learned counsel for the plaintiff submitted that the said agreement and the substitution under the power of attorney are prima facie evidence that the plaintiff has interests and right over the said lands as at the time of signing the two documents, there is no certainty that the lands would be issued native titles.

[15] Learned counsel for the defendants however argued that the second to sixth defendants have not authorised Abdillah bin Amil to sublease the said lands. There is also no proof that the Abdillah bin Amil had executed a memorandum of sublease on behalf of the second to sixth defendants for period of 99 years. There is also no evidence to show that the Abdillah bin Amil had received RM722 per year on behalf of the second to sixth defendants as a payment of rental of the said lands.

[16] It has to be borne in mind that the powers under O 18 r 19 of the Rules of the High Court should be exercised only in plain and obvious cases where it can be clearly seen that the claim or answer is on the face of it unsustainable (see *Teletech Corporation Sdn Bhd v Siemens Engineering and Services (Pte) Ltd* [1993] 2 CLJ 493).

[17] Further, power to strike out an action on disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious cases and that so long as the statement of claim disclosed some cause of action or raised some questions fit to be decided by a judge, the mere fact that case is weak and not likely to succeed is no ground for striking it out (see *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440).

[18] Whether the said agreement is a nullity is a triable issue that ought to be determine during the trial of this case. Witnesses have to be called to give evidence on the validity of the said agreement.

[19] Based on the foregoing, I am satisfied that the claim here is not plainly and obviously unsustainable. Therefore, I dismiss this application with cost.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed